No. 20,930

United States Court of Appeals

For the Ninth Circuit

San Francisco Mining Exchange,
Petitioner,

vs.

Securities and Exchange Commission,
Respondent.

PETITION FOR A REHEARING

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Subject Index

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PETITION FOR A REHEARING

To the Honorable Frederick G. Hamley, M. Oliver Koelsch and James M. Browning, Circuit Judges:

Petitioner San Francisco Mining Exchange hereby files its Petition for a Rehearing in the above-entitled matter, specifically seeking a review of the Opinion filed on May 16, 1967.

I. INTRODUCTORY.

Petitioner would point out that certain conclusions and determinations stated in the Opinion are of an individual nature, peculiar to the facts and conditions of this specific proceeding (as, for instance, the Court's conclusion that, upon the evidence before it, the Commission did not abuse its discretion in the selection of the remedy).

Very much to the contrary, other statements of the law are of broad effect and of general interest, so much so that they will be controlling in many cases and proceedings beyond the limits of this single proceeding. These are the Court's statements interpreting the right of a litigant to obtain a subpoena or a subpoena duces tecum in order to conduct an evidentiary hearing on the issue of bias and prejudice on the part of an agency member.

This subject presents currently one of the major unsolved problems of Federal administrative law upon which the Supreme Court of the United States has not yet ruled.

It is Petitioner's belief that a considered reading of the Court's Opinion can lead one to no conclusion other than that the present Opinion has emasculated completely a litigant's right to obtain such a subpoena, by requiring him to state in a supporting affidavit along with his application those very facts which he is seeking to establish and which he could obtain only with the aid of an evidentiary hearing following the issuance of the subpoena.

If that is to be the rule for this proceeding, then it must also be the law for a myriad of cases to follow.

II. THE COURT RELIED UPON INFERENCE, JUDICIAL NOTICE, AND EVEN SPECULATION IN ORDER TO ESTABLISH "FACTS" SUPPORTING ITS CONCLUSION, WITHOUT ALLOWING PETITIONER THE AID OF A SUBPOENA AND AN EVIDENTIARY HEARING TO ESTABLISH REAL FACTS WHICH WOULD HAVE OUTWEIGHED THOSE "FACTS".

In the first paragraph beginning on page 6 is to be found this revealing disclosure of the judicial process that was used:

> "*The principal inference* which is to be drawn from these excerpts is that the Commission's action in authorizing the administrative proceeding against the Exchange was based *at least in part* upon its consideration of the staff report." (Emphasis added.)

Yes, "*at least in part*", but what was the other part? Why not allow Petitioner an opportunity to show that? Should not the whole picture and the real truth be established, whatever it may have been?

At any rate, there "*inference*" was relied upon to establish "facts."

Now, "*speculation*" appears! Consider this (second paragraph on page 7):

> "*It may be* that the Commission members, in deciding this case on the merits, made use of the staff report *and other information* that may have been brought to their attention . . ." (Emphasis added.)

In this connection, it cannot be forgotten that the Commission had ordered the staff report: "*revised in accordance with the Commission's directions.*" (a direct quotation.) If it was revised, then the Commission must have had before it and considered some other information. What was it? Why was it ordered stricken? Was it prejudicial?

However, to go back to the Court's speculative endeavor. Remember the statement of its speculation that:

> "*It may be* that the Commission members, in deciding this case on the merits, *made use of the staff report and other information that may have been* brought to their attention . . . ." (Emphasis added.)

Immediately, there follows this conclusion:

> "However, *absent any factual basis for believing* that the Commission made use of these materials, as is the case here . . ." (Emphasis added).

But it was Petitioner's right to obtain the issuance of a subpoena so that it could conduct an evidentiary hearing to establish those very facts.

By what process, either of a judicial nature or as a matter of trial procedure, may one establish facts without conducting an evidentiary hearing? Seriously, how does a litigant or his counsel, however experienced and adroit, obtain facts for statement in an affidavit without first being allowed to conduct an evidentiary hearing, and being afforded the implements essential to compel the giving, though reluctantly, of vital testimony that establishes those facts?

Proceeding on to a review of the Court's use of "*judicial notice*" to support its conclusion, we find this significant statement (at the bottom of page 8):

> "In any event, the facts stated above, of which *we take judicial notice, indicate* that the prior staff activities of Commissioners Cohen and Woodside were too remote in time and too unrelated in function . . ." (Emphasis added).

A review of the cited portions of the Opinion demonstrates beyond doubt that, in an effort to state a reasoned basis for its ultimate conclusion, the Court has actually engaged in a process of ferreting out and weighing facts, or evidence. In so doing it has relied, demonstrably, upon a collation of inference, judicial notice, and even speculation to establish the "facts." These are obviously the sources of *"the facts stated above"* (quote from bottom of page 8).

Having established these "facts," the Court then proceeds to weigh them against the recitals of Petitioner's counsel's affidavit. That the Court actually engaged in a process of weighing the evidence (referred to in the

Opinion as "the facts") is clear beyond any possible doubt.

The Court weighed "the facts" based upon inference, judicial notice and speculation (for respondent filed no counter-affidavit or other factual statement) against the statements in the affidavit filed in support of the request for a subpoena to enable Petitioner to establish the real facts which would have overcome inference, judicial notice and speculation.

The Court's conclusion that the subpoenas should not have been issued was based upon its several statements that "the facts" were not stated in the supporting affidavit. In each such instance the facts not so stated were those which Petitioner was endeavoring to establish by an evidentiary hearing.

That this contention is correct is demonstrated by these excerpts from the Opinion:

> (1) "If counsel meant to imply that the Commission supervised its preparation, *he alleged no facts in support of such a conclusion.*" (Top of page 7.)
>
> (2) "However, *absent any factual basis* for believing that the Commission made such use of these materials . . ." (Middle of page 7.)
>
> (3) "In the case before us, however, *no such factual allegations were made* by the Exchange . . ." (Bottom of page 10.)
>
> (4) "*There is simply no showing of any such activity* on the part of Commissioners Cohen and Woodside with regard to Exchange's case, *nor is there an adequate factual showing* that any member of the Commission had prejudged the case." (Middle of page 11.)

In each cited instance it is apparent at once that the facts found to be missing from the supporting affidavit were the identical facts which Petitioner had made clear that it sought to establish by the evidentiary hearing which would follow upon the issuance of the requested subpoenas.

III. CONCLUSION: THE BURDEN WHICH THE OPINION IN THIS CASE PLACES UPON A LITIGANT, OF RECITING IN HIS PRELIMINARY SUPPORTING AFFIDAVIT THOSE VERY FACTS WHICH HE IS SEEKING TO ESTABLISH BY USE OF SUBPOENAS AND AN EVIDENTIARY HEARING, DEPRIVES HIM OF DUE PROCESS OF LAW.

Petitioner readily concedes that eventually it would have had to marshal and prove facts that would have outweighed and overcome those which the Court referred to as "the facts above stated, of which we take judicial notice."

This should have been, however, after Petitioner's request for subpoenas had been granted (as was ordered by the Hearing Examiner) and after the conduct of an evidentiary hearing. Only by such procedure could Petitioner have been afforded due process of law.

Both in this proceeding, and in the myriad of cases that will follow, to establish a rule that imposes upon the litigant the burden of stating in a preliminary affidavit, those very facts which he seeks to establish by the issuance and use of the subpoena, is to emasculate the provision for the use of subpoenas, and to deny to the litigant due process of law.

Dated, San Francisco, California,
June 13, 1967.

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CERTIFICATE OF COUNSEL

Pursuant to the provisions of Rule 23 of the Rules of this Court, I hereby certify that, in my judgment, the annexed petition for rehearing is well founded and that it is not interposed for delay.

GARDINER JOHNSON.